In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AS AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

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This brief, filed pursuant to written consents obtained from all parties as required by this court's

Rule 42(2), is submitted by International Longshoremen's and Warehousemen's Union (herein the union) as amicus curiae in support of the judgment below.

The interest of the union is manifest from the record. The employees represented by it are the persons for whose benefit the moneys involved in this case (herein the Mech Fund) are collected. If these moneys are not collected and do not get into the Fund, the employers, represented by Pacific Maritime Association (herein PMA), will be unable to fulfill their contractual obligations to the employees.

Indeed, the collective bargaining contract between the union and PMA provides that "in the . . . event *any portion* of the Plan is held unlawful *under any law* by any decision of any court," the obligations to PMA "to continue to accumulate the Mechanization Fund" and of the employers "to pay further contributions" to it "shall be immediately suspended." (EX 1-C, Article VI, Section 9; R. 308a; italics supplied).

In these events, the union, as the collective bargaining representative of the employees, would have to treat the contract as nonexistent and might have to resort to economic self-help to obtain a new and "lawful" contract.

It is in order to urge upon the court that it eschew an interpretation of Section 15 of the Shipping Act (46 USC 814) which could lead to such results, that the union files this brief.

1. **THE MECH FUND IS PART OF ONE OF THE MOST SIGNIFICANT ADVANCES IN AMERICAN COLLECTIVE BARGAINING.**

The stormy history of labor relations in the Pacific Coast longshore industry is sufficiently well-known to require no extensive elucidation in this brief. It may be sufficient for present purposes to quote from a paper by the Director of the Western Regional Office of the Bureau of Labor Statistics of the Department of Labor:

> The bitterness which had characterized the industry [prior to the 1934 general strike] carried over into the subsequent employer-union relationship. The employers did their best to break the union, and the union retaliated just as militantly. The years which followed were among the stormiest in U.S. labor history. Between 1934 and 1948, the West Coast had over 20 major port strikes, more than 300 days of coastwide strikes, about 1,300 local job action strikes, and about 250 arbitration awards.[1]

One of the principal issues around which many of these battles were fought was the employers' desire to do away with certain work practices upon which the union had long insisted: limitations on the size of cargo loads to be handled, requirements that longshore gangs contain a certain minimum number of men, and the like. To the employer such practices meant low productivity and increased cost; to the union they meant more jobs for more men. For many

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[1]Kossoris, *Working Rules in West Coast Longshoring*, 84 MONTHLY LABOR REV. 1 (1961). See also Killingsworth, *The Modernization of West Coast Longshore Work Rules*, 15 INDUSTRIAL AND LABOR REV. 295 (1962).

years, there seemed no way out of the impasse thus created by a powerful employers' association confronting a powerful union on this issue.

Finally, beginning in 1948, the possibility of an accommodation became discernible due, in large measure, to a change in employer leadership and to an awakening recognition that the men were entitled to share in the economic gains which the employers would obtain by new methods of operation (R. 191a). Ultimately, the union leadership came to recognize that, while the union might continue to wage guerrilla warfare against mechanization, it would be in the long-run interests of the men to accept the inevitable and to attempt, by collective bargaining, to procure a fair share of the savings which new technology would make possible (R. 187a-189a).[2]

With all the good will in the world, however, it was to take years of careful, responsible collective bargaining (and on both sides an education of reluctant members)[3] before a significant approach could be made to the problem.

As a result of a slowly growing feeling of mutual trust and confidence, the parties began in the 1950s to explore ways and means of increasing productivity

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[2]Fairley, *The ILWU-PMA Mechanization and Modernization Agreement*, 12 LABOR LAW J. 664, 667 (1961).

[3]Horvitz, *The ILWU-PMA Mechanization and Modernization Agreement: An Experiment in Industrial Relations*, PROCEEDINGS OF THE SIXTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, No. 32, p. 22; Fairley, *The ILWU-PMA Mechanization and Modernization Agreement, An Evaluation of Experience Under the Agreement; The Union's Viewpoint*, PROCEEDINGS OF THE SIXTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, No. 32, p. 34 (1963).

(and thereby of increasing shipping on the West Coast), while at the same time retaining for the workers the economic advantages which they had won through the restrictive work practices.

The resulting labor management contract, of which the Mech Fund is the very heart, represents a historic advance in American collective bargaining.

The Court below noted that

> This fund was . . . to be used to cushion the effects of higher production upon longshoremen and marine clerks displaced by mechanization. . . . The necessity for the fund itself is not here in controversy; in fact, all parties agree that it serves a salutary purpose. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 371 F. 2d 747, 749 (C.A.D.C. 1966).

The director of the Department of Labor's Western Regional Office of Labor Statistics, heretofore quoted, has observed

> Employers gain a free hand in managing their business, and the union gains the security of a guaranteed wage and the vested right benefit through a share of the savings accruing from the modernization of the industry. And significantly, this result was achieved in peaceful, intelligent discussions across the negotiating table.
>
> Other industries may find it possible to develop variations of this approach in solving their own work-rule problems. The significance of the West Coast longshore development lies in the fact that it demonstrates that management can resolve this difficulty by giving labor a share in the gains

> brought about by rapid technological change, while at the same time safeguarding worker security. This generally untried approach to meet the effects of increased mechanization and automation deserves close attention.[4]

An eminent professor of labor and industrial relations notes that

> The principal lesson which seems to emerge from the West Coast longshore experience is that, with a spirit of mutual acceptance and with some common understanding of their mutual problems, employer and union representatives can achieve the difficult feat of fundamentally revising their mode of accommodation without outside help; but they must expect to spend months and years at the task.[5]

The National Labor Relations Board, the government agency most directly involved in this area of national policy, has recognized that

> The automation concord . . . has been widely acclaimed as a history-making precedent, a peaceful settlement of a problem which has troubled the West Coast waterfront for a number of years. *International Longshoremen's and Warehousemen's Union (American Mail Line),* 144 NLRB 1432, 1442 (1963).

And

> . . . the . . . agreement . . . constituted a pioneering settlement . . . of the larger manpower and economic problem resulting from the increasing

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[4]Kossoris, supra, n. 1, at 10.

[5]Killingsworth, supra, n. 1, at 306.

> use of mechanized equipment on the waterfront. *International Longshoremen's and Warehousemen's Union (Albin Stevedore Co.),* 144 NLRB 1443, 1448 (1963).

And

> . . . this agreement is a pioneer settlement between PMA and [ILWU] of manpower and economic problems resulting from the increasing use of mechanized equipment on the waterfront and may well serve to promote industrial peace in this area of American industry. *International Longshoremen's and Warehousemen's Union (Howard Terminal),* 147 NLRB 359, 366 (1964).

Finally,

> The primary objective of that [mechanization] agreement, as the Board has recognized, was to lighten the impact of unemployment upon longshoremen created by the increased use of mechanized equipment in longshore operations, and thereby promote industrial peace in this area of American industry. *United Industrial Workers of North America (Albin Stevedore Co.),* 162 NLRB No. 96, 64 LRRM 1118, 1120 (1967).

The national labor policy favoring the settlement of these difficult problems by free collective bargaining requires that this court approach the collective bargaining contract here involved with the most sympathetic understanding and that it not permit a farfetched application of a statute designed to deal with entirely different problems to work a frustration of what the parties have attempted to accomplish here.

It certainly is not within the spirit of the Shipping Act, nor was it the intention of its authors, to embarrass, impede or frustrate collective bargaining. Therefore, even if the words of the Shipping Act should be held unambiguously to embrace the formula devised by PMA to raise the money to meet its collective bargaining obligations, that "does not end inquiry into Congress' purpose" in enacting the Shipping Act. *National Woodwork Manufacturers Association v. National Labor Relations Board,* 386 US 612, 619 (1967).

The national policy which, on the one hand, encourages collective bargaining (National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USCA 151) and which, on the other, is vitally concerned with solutions to the problems created by the increasing mechanization of American industry (Manpower Development and Training Act of 1962, 76 Stat. 23, 77 Stat. 422, 42 USCA 2571), requires that the Shipping Act not be construed or applied in a way which will defeat those objectives.

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2. IT IS UNREALISTIC TO SUGGEST THAT THE FINANCING OF THE MECH FUND IS NO PART OF THE COLLECTIVE BARGAINING RELATIONSHIP BETWEEN THE PARTIES.

It is conceded by the Solicitor General that if the financing formula had been spelled out in the collective bargaining contract establishing the Mech Fund, the Shipping Act would have no application to this case (Brief for the United States, 31). The fact

that the parties left it to one of them to devise methods of financially implementing their collective bargain[6] does not change the character of what is involved.

Such a procedure in collective bargaining is not unique to the Pacific Coast Longshoremen's Mech Fund.

> Q. Mr. St. Sure, from your experience, do you know of other situations in other industries where a fringe benefit plan has been negotiated with the union and the method of raising this fund to take care of that fringe benefit was in the negotiations reserved to the employers? A. Well, the most nearest parallel that I can think of, and I have represented department store groups in the joint bargaining, and the same thing has occurred I think in the milk industry where in bargaining for a welfare plan or a pension plan where you put a group of employers into a single package, and you have one employer who has been in business for ten years and one who has been in business 50 years, you necessarily have a different experience rating based upon the age group in the separate plants.
>
> An old employer may have a work force which is an average of 50, and the new employer may have an average cost of providing a hundred pensions, for example. These costs are quite differ-

[6]The Solicitor himself recognizes that what happened was that "the Association's board of directors determined *to implement the* [collective bargaining] *agreement* by assessing each member an annual rate for each ton of cargo handled. . . ." He further states that a question presented by this case is "wherever *the implementation of the employers' agreement* for allocating the cost of the mechanization fund . . ." comes within the scope of the Shipping Act (Brief for the United States, 2; italics supplied).

ent. The same is true with regard to welfare plans where age or sex will make a difference in the experience rating of a particular welfare item.

In these situations it is frequently done, and I have negotiated agreements where the employer agrees to guarantee a set of benefits and says to the union, "We are not going to tell you what the contribution is. We are going to provide within ourselves the method of providing the premium or the money required."

And then the employers themselves literally divide amongst themselves on an equitable basis how this money should be raised, which is not a part of the union contract.

The contract is to provide the benefit (R. 215a).

In this case the agreement with the union was that PMA would devise a funding method which would assure collection of the money consistently with the overall objective of revitalizing the industry. (R. 210a-212a). The agreement (EX 1-C, Article II, Section 2; R. 284a) specifically provides that employers who are members of PMA shall contribute to the Mech Fund "in the amounts and at the rates" set forth in the agreement, pursuant to the method developed by PMA under the power reserved to it "to adopt and change the method, manner and amount of collecting contributions." *Thus, it was part of the collective bargain itself that each employer would abide by the formula adopted by the Association.*

The agreement that each employer would comply with the Association's formula and not seek to upset it, thereby jeopardizing the whole enterprise, was the

quid pro quo for the union's agreement not to insist upon writing any formula into the contract. It was a concession which the union made in good faith when presented with the employers' desire that, at least at the beginning of the mechanization program, no fixed formula be written into the collective bargaining contract in order to preserve such flexibility as might be required for the future.[7] In making this concession, the ILWU was fully aware, as a consequence of two years of negotiations, that the employers would be limited to use of man-hour or tonnage assessments, or combinations of each, in funding of the Plan. (R. 210a).

If one shipper may upset these collective bargaining arrangements by utilizing a strained interpretation of the Shipping Act, then the entire agreement is undermined and the door is open to similar action by other shippers, with the result that shambles may be made of the industry-wide financing of the Mech Fund.

If VW succeeds in upsetting the formula, then, competition being what it is, every other importer of automobiles may be expected to attempt to do likewise. And if automobile importers may do so, why should not other shippers try also?[8]

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[7]Petitioner recognizes that, "Fear of a union take-over of the system of assessment played a large part in the committee's deliberations and was an important factor in the decision not to use the alternatives considered." (Brief for Petitioner, 6.)

[8]An employer spokesman has noted that the plan was possible only because the employers were willing to ignore their "diversity of interest in so many areas" and "unite in an attack on a common cost problem". Horvitz, *supra*, n. 3, at 23.

Thus viewed, it is clear that the method of raising the money for the Mech Fund is an integral part of the collective bargaining process and requires the protection which the Solicitor concedes is to be accorded to a contract resulting from that process. The Solicitor is in grievous error in suggesting that, while the underlying collective bargaining contract is exempt from the provisions of the Shipping Act, its direct implementation is not so exempt, because, he says, it is not a part of the collective bargain.

This court has insisted that "within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed". *Local 24, International Brotherhood v. Oliver,* 358 US 283, 295 (1959).

The financing of the Mech Fund is properly a subject of collective bargaining concern and the union had, and still has, a continuing interest therein.

> Q. Mr. St. Sure, once that agreement was reached with the union, was the situation that the union lost all interest in the method of collection? A. No.
>
> Q. Or would you say there was a continuing interest? A. There was a continuing interest and a continuing concern as to whether or not the collections under the fund were being met. Obviously they have, by joint trusteeship, joint custody of the fund, and I can assure you that they were alert as to whether or not the method of the custody, was working, because they believed this and, in fact, knew it was their money to spend in accordance with the agreement. (R. 211a).

* * * * * * *

> Q. Supposing that the PMA had adopted a system that, let's say, would result in abolishing whole segments of the industry, what would you think would have then been the union reaction? A. I am quite sure that if any agreement had been reached which would have brought about such a result, we would have an obligation, and I am sure the union would insist upon it, *to reopen the bargaining and to resume the bargaining as to the means by which the funds were to be collected.*
>
> After all, *this was a continuing relationship* that we have, by the collective bargaining agreement, and my experience would suggest to me that we couldn't have adopted the method which would defeat the very purpose for which we had reached a bargain without having further negotiations. (R. 212a; italics supplied).[9]

The record reveals that, on its side, PMA treated the financing of the Fund as an integral part of the collective bargaining process. It is significant that the committee utilized by PMA to establish the funding formula was a subcommittee of its collective bargaining negotiating committee and that the member-

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[9]The execution of the collective bargaining contract does not terminate the collective bargaining relationship. Section 8(d) of the National Labor Relations Act, as amended (29 USCA 158 [d]); *National Labor Relations Board v. Sands Manufacturing Co.* (1939), 306 US 332, 342; *The Crescent Bed Company, Inc.* (1966), 157 NLRB 296; Cox, *Law and the National Labor Policy* (INSTITUTE OF INDUSTRIAL RELATIONS, UNIVERSITY OF CALIFORNIA, 1960) 79. Compare Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490 (1959); Howard, *Labor Management Arbitration*, 21 MO. L. REV. 1, 25 (1956).

ship's ratification of the collective bargaining contract and its adoption of the funding formula occurred "at the same time". (Brief for Petitioner, 6; see R. 216a-217a).

In order to accomplish this internal determination *as a part of the ultimate bargain,* the Coast Steering Committee, *which is and was the negotiating group,* named a subcommittee which is the Peter Teige Committee, and instructed that committee to consider the question of a method of collection, having in mind the various arguments that had been going on within the membership of PMA to make a recommendation which could be presented to the board of directors by the first of the year, and that in turn then presented to the membership of PMA for ratification.

Q. Was the fact that the Coast Steering Committee was a negotiating committee, did that fact have any bearing on why it was appointed as it was? A. Well, *this was still part of the bargaining process. We were still actually trying to conclude the bargain which we had developed and had signed a memorandum to cover.* We still had the responsibility *as a negotiating committee* of reporting back to the board of directors, and then to the membership, and this was simply a convenient means of calling in some men that we felt were more expert in this field than the negotiators were who were operating people to make a recommendation as to a method of payment. (R. 216a; italics supplied.)

The closeness of the relationship between the collective bargain and the method used by PMA to finance the fund is shown by the fact that the tonnage

formula ultimately adopted is the identical one proposed by the union in negotiations (R. 210a) and follows the established industry method of distributing various labor contract costs: dispatch hall, arbitration expenses, and the like (R. 217a-218a). No special arrangements were made in this case that PMA had not made in all other cases in which it was necessary to spread labor costs. (EX. 5-A; R. 466a-474a.)

It must also be noted that the employers themselves recognized,

> There is no gainsaying the fact that some operators are in a better position to take advantage of the agreement than are others. However, there is a wide variety of opportunity and advantages are fairly evenly divided, for the operator who relies heavily on technology must also make heavy capital outlays which are largely irrevocable commitments. Those whose operations have limited technological opportunity can and do devote their efforts in other areas of relief from restriction granted by the agreement.[10]

However this may be, the overall gain to the industry is seen in the conclusion drawn by the same employer spokesman.

> Most of the employers I think recognize that there has been a fundamental shift in attitude on both sides despite the problems and a mutual recognition of the need for change and the complementary obligation to share the gains of progress. Shifts in attitude, problem solving rather

[10]Horvitz, *supra*, n. 3, at 24.

than conflict bargaining, reduction of resistance to change, the substitution of law for jungle warfare are trite and familiar phrases in labor relations but they are applicable to present relations between the employers and the longshore union on the West Coast. Whether it be the relatively smooth introduction of new equipment, or a marked improvement in vessel turn around time because of more efficient utilization of labor on ship and on shore, these things are part and parcel of a total framework constructed on a base of the M & M Agreement. In the view of most of us, this total framework is the real essence of the agreement and our hope for the future of the industry.[11]

It is clear that the financing of the Mech Fund is an integral part of the collective bargaining contractual relation between PMA and the union and is entitled to precisely that protection which the Solicitor General would accord to the formal written collective bargaining contract itself.

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3. THE PRE-EMPTIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS ACT PRECLUDES THE APPLICATION OF THE SHIPPING ACT TO THIS CASE.

It is true that everyone involved, including Volkswagen (Brief for Petitioner, 2) is loud in commendation of the Mech Fund and the purposes it seeks to accomplish. The fact is, however, that if petitioner is sustained here, then, for all practical purposes, the Fund may as well be jettisoned. If an arrangement

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[11] *Id.*, at 33.

by which employers implement and carry out their collective bargain is subject to the Shipping Act, then, as a practical matter, the collective bargaining contract itself cannot be put into effect without the prior approval of the Maritime Commission.

Such a result is directly at war with Congress' objective in confiding "primary jurisdiction" in labor relation matters to "a specific and specifically constituted tribunal", i.e., the National Labor Relations Board. *San Diego Building Trades Council v. Garmon,* 359 US 236, 245 (1959).

If the Maritime Commission, contrary to its own order, is directed by this court to require the filing and approval (or disapproval) of the funding arrangement, a potential for conflict between it and the Labor Board is immediately created.

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law . . ." *Garner v. Teamsters Union,* 346 US 485, 490 (1953).

The fact that the Shipping Act contains "heavy civil penalties" (Brief for the United States, 17) only aggravates the problem. In striking down a state's award of damages in a matter within the pre-emptive jurisdiction of the Labor Board, this court has said:

> "The obligation to pay damages can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon,* 359 US, at 247.

If this court holds that the financing of the Mech Fund is subject to the Shipping Act, then that Act's "heavy penalties" will serve as a powerful deterrent against the making of the payments called for by the collective bargaining contract.

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4. A REVERSAL OF THE JUDGMENT BELOW WILL HAVE A SIGNIFICANTLY DIRE EFFECT UPON THE OPERATION OF THE MECH FUND.

If this court holds that the collection of the fund must be suspended pending approval of the PMA formula under Section 15, the effects upon the West Coast longshore industry will be disastrous. Not only may the employers assert that the past payments they have made were invalid,[12] but, under such a holding, PMA will surely have no funds with which to make future payments and Volkswagen's bland assertion that a holding in its favor will not redound "to the detriment of labor on the Pacific Coast" (Brief for Petitioner, 73) is utterly without foundation in the record.

To the contrary, thousands of dockworkers who were induced by the agreement to retire early will not receive the checks which they expect each month.

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[12]The Solicitor may "assume" that PMA members will not seek restitution for past payments if those are judged to be invalid (Brief for the United States, 10), but the longshore industry on the Pacific Coast can hardly operate on the basis of such an unfounded assumption by one not even privy to the affairs of PMA. Moreover, many substantial customers of PMA members, such as the Army, not being members of PMA, are not precluded from seeking restitution of (unlawful) charges included within their cost-plus rates.

This result derives from the fact that the agreement expressly precludes prior funding of the existing benefit trust, i.e., transfer to the trustees of any moneys "which are not required by said Trustees for *immediate* payment of" obligations owed vestees (EX. 1-C; Art. IV[b][3]; R. 291a; italics supplied). The trust res consists solely of the contract right of the trustees to demand from PMA, as collecting agent of contributing employers, the requisite funds to meet *current* obligations (now $2.20 per month per individual) owed retired employees. If PMA has no lawful means of collecting funds for transmittal to the trustees until the Commission has acted after a hearing, the trustees must default in their obligation to the retired dockworkers. Nor may PMA use funds already in its possession if the funding method is declared unlawful until approved under Section 15. The agreement expressly provides that PMA acts solely as collecting agent for the contributing employers and all moneys within PMA's possession, which are designated as the "Mechanization Fund" (EX. 1-C; Art. I §9; R. 283a), belong to each such employer pro rata until the moneys are transferred by PMA to trusts employed to effectuate the Plan. (EX. 1-C; Art. II §2[d]; R. 285a-286a). Hence, if the contributions have been received by PMA under a formula unlawful until approved by the Commission, PMA as an agent must return to each principal its share of the Mechanization Fund and not divert any portion of the illegally accumulated Fund to the trustees for payment of benefits to the retired dockworkers.

Considering that there are now thousands of longshoremen who have already retired under the plan and who weekly rely upon their Mech Fund checks, such a situation will create a most disturbing reaction in the West Coast shipping industry.

Since the opinion of the Federal Maritime Commission and the judgment of the court below have established that the construction of the Shipping Act contended for by petitioner, and which could lead to the results here indicated, is not required as a matter of law, and, in any event, is not supported by the record, that construction should not be adopted by this court. The intrusion of the Federal Maritime Commission into areas reserved for the National Labor Relations Board should not be permitted by this court—particularly over the objections of the Commission itself.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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